



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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Contact Person:

Identification Number:

Date: August 20, 2013

Contact Number:

EIN:

UIL: 4941.04-00 Definition of Self-Dealing

Legend

Collection	=
Grantor	=
Trust	=
Vendor	=
State	=

Dear :

This is in response to your ruling request, dated February 1, 2012, and amended on April 29, 2013. You are requesting certain rulings with respect to the income tax consequences under § 4941 of the Internal Revenue Code (I.R.C.) of a disqualified person's loan of property to you.

Facts

You are a State nonprofit corporation recognized as exempt under § 501(a) as an organization described in § 501(c)(3), and classified as a private operating foundation under § 4940(d). One of your exempt purposes is education. Your activities include exhibitions, educational programs and academic relationships, and original research and published materials. Your primary activity is the operation of a museum open seasonally to the public during regularly scheduled hours and year round to academics, group tours, and events on weekends and other times by appointment. Your regularly scheduled hours are seven hours per day, three days per week.

Grantor is the owner of the Collection consisting of a library portion and an artifact portion. The library portion consists of books, documents, photos, and memorabilia about artifacts generally (together the "*Library Collection*"). The artifact portion consists of artifacts selected for their historical, social, technical, or aesthetic significance (the "*Artifact Collection*"). Grantor plans to transfer ownership of the Collection to Trust, a revocable living trust of which Grantor is Trustee. Trust and Grantor are each disqualified persons with respect to you within the meaning of § 4946(a)(1).

Currently, Grantor loans the Library Collection to you free of charge. Trust will pay all expenses for the betterment of the Library Collection; in turn, you will pay all repairs and maintenance, preservation, and safekeeping costs of the Library Collection.

Grantor through Trust proposes to loan the Artifact Collection to you free of charge as well. In addition, Trust will provide office and display space for your exclusive use in a building that it owns free of charge, provide office equipment, furniture, and supplies, and accounting services and other general and administrative services. Vendor, which is solely owned by Grantor and therefore is itself a disqualified person with respect to you under § 4946(a)(1) occupies the portion of the building you do not use.

You and Vendor will share the cost of the building maintenance. Various occupancy costs such as security, landscaping, cleaning, building repair and maintenance, lighting, pest control, trash, water and sewer, association dues, etc., will be allocated between you and Vendor according to your respective occupancies based on square footage. General and administration costs including the telephone system, copy machines, computers and other equipment costs will be provided by Vendor to you at no cost as well. Any direct costs that you incur in connection with the office equipment will be paid by you directly to unrelated vendors. Any furniture, office equipment, or other supplies purchased by you will not be available for Grantor's use. You and Vendor will pay your respective portion of occupancy costs associated with the building directly to third party service providers. Vendor's portion of the occupancy costs is based on the percentage of building space Vendor uses, and any costs not directly attributable to you will be paid by Vendor.

The Artifact Collection is subject to additional expenses due to its nature. Pursuant to the loan agreement, you will transport artifacts for exhibition at appropriate public events and use certain artifacts in competitions. You will pay for associated expenses such as transportation, insurance, etc. Grantor and/or Vendor may from time to time to participate in exhibitions by sitting as panel judges and speak to the technical and historical importance of the artifacts. However, Grantor and Vendor will pay their own expenses.

Trust will pay all capital expenses which improve an artifact such as restoration. With respect to the Artifact Collection, you are responsible for all maintenance and conservation costs. Vendor will, at no charge to you, perform restoration services. For a fee, Vendor will also perform specialized repairs and maintenance. This fee will be no more than the actual costs of the technicians performing work and excludes all overhead expenses including front office expenses and supplies used.

You propose to hire employees to perform certain low-level conservation tasks. Vendor's employees will perform specialized conservation tasks which require long years of study to master, particularly since the results must satisfy museum quality standards for historical artifacts.

The Collection loan period is 5 years automatically renewable for an additional 5 years. Trust will deliver the Collection to you. You have a duty of care with respect to the display, preservation, and safekeeping of the Collection to the same standard you use for your own comparable property but not less than the standard of care adopted by museums accredited by the American Alliance of Museums (formerly known as the American Association of Museums). You will insure the Collection while in your possession. You will pay all ordinary and necessary maintenance expenses in connection with your duty of care. You may but are not obligated to credit ownership of the Collection with a notice "Courtesy of [Trust] Collection." Trust retains ownership of the Collection.

You have formal relationships with a public university and a private college each exempt under § 501(c)(3), to provide for the academic study of the Collection by faculty and students. One goal of the academic partnerships is to digitize the Library Collection. The Library Collection is open to the public only during scheduled hours. It is available to academia on an appointment basis. In addition, you provide docent led tours by appointment to local schools, nonprofits, and educational organizations. The Artifact Collection will also be open to the public. You also provide an internship program through a college to train students about artifacts, and museum operations.

You hold a biennial artifact Symposium which is open to the public. You charge a fee to cover the cost of the event. The Symposium is designed to provide valuable education for the museum curators and specialists regarding the artifacts and provides for small group seminars, panel discussions, and gallery studies of the Collection, and restoration and shop presentations from nationally renowned restorers and conservators.

Neither Trust nor Grantor has taken a charitable deduction with respect to Collection. Upon the death of Grantor, the assets of Trust will be transferred to an organization that is exempt from federal income tax pursuant to § 501(c)(3) and satisfies the requirements under §§ 170(c), 170(b)(1)(A), 2055(a) and 2522(a).

Rulings Requested

1. The lending by Trust, a revocable grantor trust beneficially owned by Grantor, of the Artifact Collection to you is not an act of self-dealing within the meaning of § 4941(d)(1)(C) by reason of the "without charge" exception in § 4941(d)(2)(C) even though you will assume the cost of transportation, insurance, conservation and maintenance with respect to the Artifact Collection.
2. The lease by Trust of display space associated with the Artifact and Library Collections to you is not an act of self-dealing within the meaning of § 4941(d)(1)(A) by reason of the "without charge" exception in § 4941(d)(2)(C) even though Trust will directly pay its allocated portion of shared building expenses invoiced by third party vendors such as utility companies, maintenance contractors, and insurance providers.
3. Certain reasonable payments made by you to Vendor for technical assistance in conserving and maintaining the Artifact Collection will not be treated as an act of self-dealing under the "reasonable and necessary" compensation exception in § 4941(d)(2)(E).
4. The participation by Grantor and/or Vendor in certain show or event activities on behalf of you; and the acknowledgement of Grantor, and/or Vendor, even if not directly participating, result in only incidental benefit and do not result in "self-dealing" under the "incidental or tenuous benefit" exception in § 53.4941(d)-2(f)(2).

Law

I.R.C. § 501(c)(3) provides an exemption from federal tax for organizations that are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

I.R.C. § 4941 imposes an excise tax on private foundations and foundation managers for each act of self-dealing and between a private foundation and a disqualified person. Subsection (d) defines the term "self-dealing" includes any direct or indirect (i) sale or exchange, or leasing, of property between a private foundation and a disqualified person, (ii) lending of money or other extension of credit between a private foundation and a disqualified person, (iii) furnishing of goods, services, or facilities between a private foundation and a disqualified person, (iv) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person, and (iv) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation.

I.R.C. § 4941(d)(2) provides special rules which modify the definition of self-dealing in relevant part, subparagraph (C) the furnishing of goods, services, or facilities by a disqualified person to a private foundation shall not be an act of self-dealing if the furnishing is without charge and if the goods, services, or facilities so furnished are used exclusively for purposes specified in § 501(c)(3); subparagraph (D) the furnishing of goods, services, or facilities by a private foundation to a disqualified person shall not be an act of self-dealing if such furnishing is made on a basis no more favorable than that on which such goods, services, or facilities are made available to the general public, and subparagraph (E) except in the case of a government official (as defined in § 4946(c)), the payment of compensation (and the payment or reimbursement of expenses) by a private foundation to a disqualified person for personal services which are reasonable and necessary to carrying out the exempt purpose of the private foundation shall not be an act of self-dealing if the compensation (or payment or reimbursement) is not excessive;

I.R.C. § 4946(a)(1) defines "disqualified persons" to include, with respect to a private foundation, a person who is a substantial contributor to the foundation or a corporation of which a person who is a substantial contributor owns more than 35 percent of the profits interest.

Treas. Reg. § 53.4941(d)-2(b)(2) provides that the leasing of property by a disqualified person to a private foundation shall not be an act of self-dealing if the lease is without charge. For purposes of this subparagraph, a lease shall be considered to be without charge even though the private foundation pays for janitorial services, utilities, or other maintenance costs it incurs for the use of the property, so long as the payment is not made directly or indirectly to a disqualified person.

Treas. Reg. § 53.4941(d)-2(d)(3) excludes from self-dealing furnishing of goods, services, or facilities without charge. Thus, for example, the furnishing of goods such as pencils, stationery, or other incidental supplies, or the furnishing of facilities such as a building, by a disqualified person to a foundation shall be allowed if such supplies or facilities are furnished without charge. Similarly, the furnishing of services (even though such services are not personal in nature) shall be permitted if such furnishing is without charge. For purposes of this subparagraph, a furnishing of goods shall be considered without charge even though the private foundation pays for transportation, insurance, or maintenance costs it incurs in obtaining or using the property, so long as the payment is not made directly or indirectly to the disqualified person.

Treas. Reg. § 53.4941(d)-2(f)(1) provides that generally the transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation shall constitute an act of self-dealing.

Treas. Reg. § 53.4941(d)-2(f)(2) provides an exclusion for certain incidental benefits. The fact that a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets will not, by itself, make such use an act of self-dealing. Thus, the public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a substantial contributor, does not in itself result in an act of self-dealing since generally the benefit is incidental and tenuous.

Treas. Reg. § 53.4941(d)-3(c) explains that the exception to self-dealing stated in § 4941(d)(2)(E) for the payment of compensation by a private foundation to a disqualified person for the performance of personal services includes brokerage, banking and legal services.

Treas. Reg. § 53.4941(d)-3(c)(2) list examples of personal services such as legal services, investment counseling services, banking services, but not manufacturing services.

In John W. Madden Jr., et al. v. Commissioner, 74 T.C.M. 440, the court upheld self-dealing excise taxes against maintenance company/disqualified person that received compensation from taxpayer, an exempt museum for services rendered since they were not "personal services" under § 4941(d)(2)(E). The maintenance, janitorial, and security work were not professional and managerial in nature, and were not reasonable and necessary to carry out taxpayer's exempt purpose of exposing people to outdoor work.

Rev. Rul. 68-372, 1968-2 C.B. 205, holds that a nonprofit organization that displays items of "lasting interest or value relating to a particular sport" is exempt.

Rev. Rul. 73-407, 1973-2 C.B. 383, holds that a contribution by a private foundation to a public charity made on the condition that the public charity change its name to that of a substantial contributor to the foundation and agree not to change the name again for 100 years does not constitute an act of self-dealing.

Rev. Rul. 74-600, 1974-2 C.B. 385, holds that even though the foundation's paintings were sometimes made available for viewing by the public, the placement in the residence of a disqualified person resulted in the direct use of the foundation's assets by or for the benefit of the disqualified person, and therefore an act of self-dealing.

Analysis

Section 4941 generally imposes a ten percent excise tax on each act of self-dealing between a disqualified person and a private foundation. Section 4941(d)(1) defines acts of self-dealing and subparagraph (2) provides some special rules.

Ruling Request 1:

Section 4941(d)(1)(C) defines self-dealing to include the direct or indirect "furnishing of goods, services, or facilities between a private foundation and a disqualified person." The furnishing of goods between a private foundation and a disqualified person is an act of self-dealing unless an exception applies. Section 4941(d)(2)(C) allows such furnishing of goods by a disqualified person to a private foundation "if the furnishing is without charge and if the goods, services, or

facilities so furnished are used exclusively for purposes specified in § 501(c)(3)."

You are borrowing the Artifact Collection from Trust without charge and exhibiting it to the public, this transaction is not an act of self-dealing within the meaning of § 4941(d)(1)(C). While you are paying for transportation, insurance, conservation (but not restoration or other improvements), and maintenance costs, § 53.4941(d)-2(d)(3) considers the furnishing of goods to be without charge "even though the private foundation pays for transportation, insurance, or maintenance costs it incurs in obtaining or using the property, so long as the payment is not made directly or indirectly to the disqualified person." All such payments are made to third-parties who are not disqualified persons.

Section 4941(d)(2)(C) also requires the goods furnished be used exclusively for purposes specified in § 501(c)(3). You are like the organization described in Rev. Rul. 68-372, 1968-2 C.B. 205, because you are a museum exhibiting artifacts of lasting interest and value, and you provide public access. The Artifact Collection consists of artifacts and memorabilia related to the history of the "technological" development of [artifacts], its "role as an agent of social and economic change", and even as an "art object." The artifacts are of lasting interest and value. You plan to display the Artifact Collection in a museum setting open to the public with regular hours of operation; to engage in public outreach through the use of volunteer tour guides; to seek public financial support; and to charge "affordable" admission fees (discounted for seniors and students.) In addition, particular artifacts and memorabilia may be displayed at public events, or loaned to other museums and universities. You will also provide access to scholars, tour groups, and for related events upon an appointment basis. Unlike the organization in Rev. Rul. 74-600, 1974-2 C.B. 385, you do not own the artifacts, and you make them regularly available to the public. Trust acknowledges that the charitable contribution deduction provided for under § 170 is not available, as the loan does not constitute a "completed gift" and you plan to display them in your museum or other places accessible to the public.

Accordingly, based on the foregoing the loan without charge of the Artifact Collection and associated memorabilia to you is not an act of self-dealing under § 4941.

Ruling Request 2:

Section 4941(d)(1)(A) makes the lease of property between a private foundation and a disqualified person an act of self-dealing unless an exception applies. Section 4941(d)(2)(C) allows disqualified persons to furnish facilities free of charge. Section 53.4941(d)-2(b)(2) provides that "a lease shall be considered to be without charge even though the private foundation pays for janitorial services, utilities, or other maintenance costs it incurs for the use of the property so long as the payment is not made directly or indirectly to a disqualified person." This regulation does not prohibit payments from disqualified persons to private foundations. Nonetheless, § 4941(d)-2(c) is a rule that generally prohibits loans and extensions of credit by private foundations to disqualified persons, with certain exceptions not applicable here, but allows disqualified persons to loan private foundations money without interest or other charge. See Treas. Reg. § 53.4941(d)-2(c)(2).

Trust will provide you with exhibit space in a building it owns without charge. Vendor is the other occupant of the facility. The lease agreement provides that you and Vendor will share occupational costs such janitorial services, utilities, or other maintenance costs, under a separate shared costs agreement based upon your respective percentage uses of the facility.

None of these costs are for improvements to the facility. Any costs not reasonably allocable to you are paid by Vendor. Vendor will pay its portion of occupancy costs of the facility directly to service providers unrelated to you.

Your payment of reasonable occupancy costs to unrelated persons does not prevent us from concluding that the lease agreement is without charge. Accordingly, the loan of the facility to you without charge for use in your charitable mission is not an act of self-dealing within the meaning of § 4941(d)(1)(A) by reason of the "without charge" exception in § 4941(d)(2)(C).

Ruling Request 3:

Section 4941(d)(1)(D) treats the "payment of compensation...by a private foundation to a disqualified person" as an act of self-dealing. However, § 4941(d)(2)(E) provides an exception where "the payment of compensation (and the payment or reimbursement of expenses) by a private foundation to a disqualified person for personal services which are reasonable and necessary to carrying out the exempt purpose of the private foundation shall not be an act of self-dealing if the compensation ... is not excessive."

Section 4941(d)(2)(E) allows an exception for personal services which are not defined in the statute, regulations, or cases. Section 53.4941(d)-3(c)(2) includes legal services, investment management services, and general banking services in the term personal services. In Madden v. Commissioner of Internal Revenue, 74 T.C.M. 440 (1997) the tax court directs the term be construed narrowly. The services provided by the disqualified person in Madden were general maintenance, janitorial, and security and were not professional in nature. After reviewing the legislative history the court concluded that personal services were "essentially professional and managerial in nature" and like the examples set out in the § 53.4941(d)-3(c)(2). Id. at 449.

You propose to hire employees to perform certain low-level conservation tasks. Unlike Madden, the services you propose to acquire from Vendor are very specific technical services for the conservation of exhibits. They require long years of study to master, particularly since the results must satisfy museum quality standards for historical artifacts. They are similar to the services an anthropologist or archeologist would provide with respect to artifacts. Such services are professional in nature.

The § 4941(d)(2)(E) exception also requires such personal services be reasonable and necessary to carrying out the exempt purpose of the private foundation, and compensation is not excessive. Conservation of exhibit artifacts is a reasonable and necessary activity of any museum. Accordingly, your engaging technical experts to perform such tasks is reasonable and necessary. While we do not rule whether the compensation is excessive but assume it is reasonable for purposes of ruling, we note favorably the circumstances here: your payments to Vendor are only the actual hourly cost of the salary and benefits of the various technical experts, there are no added administrative fees, charges for materials, or the use of equipment, and no technical experts are themselves disqualified persons.

Ruling Request 4:

Section 53.4941(d)-2(f)(2) states that no self-dealing occurs where "a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets." The regulation cites "public recognition" as an example of an incidental and tenuous benefit.

You intend to publicly display select pieces of the Artifact Collection outside of the museum from time to time, and will incur costs associated with these events such as transportation and travel expenses for staff, but not for Grantor or Vendor. Grantor will participate without charge or reimbursement as a panel judge, panel moderator, to speak as an historical expert and to the technical and historical importance of the artifacts. You intend to publicly acknowledge Grantor and/or the Vendor for making the artifacts available for display.

In Rev Rul. 73-407, 1973-2 C.B. 383, the Service held that a grant made to a public charity by private foundation on the condition that the public charity change its name to that of a substantial contributor did not constitute self-dealing. Similarly, crediting Grantor or Vendor for making the Collection available to the public does not constitute self-dealing. Accordingly, we rule that the participation of Grantor and/or Vendor in certain show or event activities on your behalf, and the acknowledgement of Grantor and/or Vendor, even if not directly participating, results in only an incidental benefit and does not result in self-dealing under the exception in § 53.4941(d)-2(f)(2).

Rulings:

Based on the foregoing, we rule as follows:

1. Trust's lending of its Artifact Collection to you is not an act of self-dealing within the meaning of § 4941(d)(1)(C) by reason of the "without charge" exception in § 4941(d)(2)(C) even though you will assume the cost of transportation, insurance, conservation and maintenance with respect to the Artifact Collection.
2. The lease by Trust of display space associated with the Artifact and Library Collections to you is not an act of self-dealing within the meaning of § 4941(d)(1)(A) by reason of the "without charge" exception in § 4941(d)(2)(C) even though Trust will directly pay the allocated portion of shared building expenses invoiced by third party vendors such as utility companies, maintenance contractors, and insurance providers.
3. Certain reasonable payments made by you to Vendor for technical assistance in conserving and maintaining the Artifact Collection will not be treated as an act of self-dealing under the "reasonable and necessary" compensation exception in § 4941(d)(2)(E).
4. The participation by Grantor and/or Vendor in certain show or event activities on behalf of you; and the acknowledgement of Grantor, and/or Vendor, even if not directly participating, result in only incidental benefit and do not result in "self-dealing" under the "incidental or tenuous benefit" exception in § 53.4941(d)-2(f)(2).

This ruling will be made available for public inspection under § 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose*. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the understanding there will be no material changes in the facts upon which it is based. Any changes that may have a bearing upon your tax status should be reported to the Service. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described.

Because this letter could help resolve any future questions about tax consequences of your activities, you should keep a copy of this ruling in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney and Declaration of Representative currently on file with the Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Theodore R. Lieber
Manager, Exempt Organizations,
Technical Group 3

Enclosure: Notice 437

cc: